U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 August 2007

CASE NO.: 2006-BLA-5595

In the Matter of

J.V.B.,
Surviving Widow of,
B.G.B.
Claimant

v.

PERFORMANCE COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

S.F. Raymond Smith, Esq.
For the Claimant

Christopher Hunter, Esq.
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a survivor's claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* ("Act"), filed on July 1, 2005. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 ("Regulations"), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;

2. Surviving dependents of coal miners whose death was due to pneumoconiosis;[1] and,

3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal workers pneumoconiosis"("CWP")) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant, J.V.B., the surviving widow of B.G.B., filed a survivor's claim for black lung benefits on July 1, 2005. (Director's Exhibit (DX) 3). The district director issued a Proposed Decision and Order on January 18, 2006 concluding Claimant was entitled to survivor's benefits. The district director found that the deceased miner had pneumoconiosis, that it arose out of coal mine employment and that his death was due to pneumoconiosis. Accordingly, benefits were awarded (DX 23). On January 19, 2006, the employer contested the determination and requested a formal hearing (DX 24). On February 27, 2006, the district director issued a "Interim Pay Letter" and initiated interim payment of benefits from the Black Lung Disability Trust Fund (DX 26). The case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs (OWCP) for a formal hearing on April 12, 2006. I was assigned the case in October 2006.

On April 12, 2007, I held a hearing in Beckley, West Virginia, at which the claimant and employer were represented by counsel.[2] No appearance was entered for the Director, OWCP. The parties were afforded the full opportunity to present evidence and argument. Director's exhibits ("DX") 2 - 30, Employer's exhibit ("EX") 1 –2, 4-12 and 14 were admitted into the record.

ISSUES

I. Whether the miner had pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner's death was due to pneumoconiosis?

[1] Claims filed on or after Jan. 1, 1982 (with an exception for survivors of miners who died on or before Mar. 1, 1978 (20 C.F.R. §718.306)). 20 C.F.R. §718.1. This applies to this claim.

[2] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(en banc), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

FINDINGS OF FACT

I. Background

A. Coal Miner

The Employer stipulated that claimant's husband was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least 10 years (Tr. 7). The miner's Social Security Administration Earnings Statement as well as statements from the miner's employers, however, establish at least 25 years of coal mine employment. This evidence, therefore, supports the district director's determination in the Proposed Decision and Order that the miner worked at least 25 years in coal mine employment (DX 23).

B. Date of Filing

The claimant filed her claim for benefits, under the Act, on July 1, 2005 (DX 3). The matter was not contested and I find none of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator[3]

The named Employer, Performance Coal Company, stipulated at the hearing that it has been properly named as the responsible operator in this matter. Employer is the last employer for whom the miner worked a cumulative period of at least one year (DX 8, Tr. 7).

D. Personal, Employment, and Smoking History

The decedent miner was born on May 6, 1948. (DX 3). He married J.V.B., the claimant, on November 16, 1979 (DX 12). He worked, underground, in the coal mines for well over twenty-five years. The miner worked in the coal mines as general laborer, roof bolter, continuous miner operator, supplyman motor-man, truck driver, car dropper and lastly as a beltman (DX 6-7). He stopped working in the mines when he was laid off on January 31, 1996 (DX 7). The miner died on June 10, 2005 (DX 13).

There is evidence of record that the miner smoked cigarettes. Claimant testified he smoked off and on, but she did not know when he started or the exact year he ceased smoking (Tr. 10).

[3] Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator, or if the responsible operator is unknown or is unable to pay benefits, with the Black Lung Disability Trust Fund. 20 C.F.R. § 725.493 (a)(1) defines responsible operator as the miner's last coal mine employer with whom he had the most recent cumulative employment of not less than one year.

II. Medical Evidence

A. Chest X-rays

There were three readings of an X-ray taken on July 28, 2004 and all three of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102 (b). Dr. Patel, a board certified radiologist and B-reader, found changes of pneumoconiosis on the chest x-ray while Dr. P. Wheeler, a board certified radiologist and B-reader and Dr. K. Hippensteel, a pulmonologist and B-reader, concluded the x-ray was negative for pneumoconiosis.

Exh. #	Date of X-ray	Physician	Qualifications *	Interpretation
DX 14	07-28-2004	M. Patel	B, BCR	2/1, s, t, large opacity A or neoplasm
EX 4	07-28-2004	P. Wheeler	B, BCR	No pneumoconiosis, chronic obstructive pulmonary disease with bullous bleb, right upper lung
EX 5	07-28-2004	K. Hippensteel	B, BCP	No pneumoconiosis, emphysema, bullous area, right upper lung

* B- B-reader; BCR- Board-Certified Radiologist; R- Radiologist; BCP-Board-Certified Pulmonologist. Readers who are board certified radiologists and/ or B readers are classified as the most qualified. B-readers need not be radiologists.

B. CT Lung Scans

On December 8, 2004, Dr. M. McJunkin reviewed a CT lung scan of the miner. Dr. McJunkin reported the scan showed evidence of centrilobular emphysema, more on the right than the left, large areas of cystic changes on the right with larger bullous formation in the right middle lobe and minimal pleural thickening and irregularity (EX 1). Dr. Wiot reviewed this CT lung scan and reported no evidence of coal worker's pneumoconiosis. Dr. Wiot stated the lung scan showed emphysema and bullous changes primarily in the right upper lobe. In addition, he reported a few hazy centrilobular nodules which were consistent with respiratory bronchioloitis (EX 2).

C. Death Certificate

The miner's death certificate, signed by Dr. Hansan, stated the miner's death was due to cardiac arrest, right heart failure, and pulmonary hypertension due to end stage chronic obstructive pulmonary disease and emphysema due to smoking and coal mining. Dr. Hansan also stated the miner had a right upper lobe bullectomy on June 7, 2005 for recurrent pneumothorax and bronchopleural fistula from the right upper lobe bulla (DX 13).

D. Treatment Records

Treatment notes from Dr. Porterfield dated March 22, 2005 note the miner was being treated with three liters of supplemental oxygen. On physical examination, Dr. Porterfield reported even and non-labored respirations with diminished lung sounds. Dr. Porterfield's impression was severe emphysema and coal worker's pneumoconiosis, oxygen dependent (DX 14).

E. Autopsy Report

At the hearing, the Employer submitted an autopsy report by Dr. E. Oesterling which was admitted as Employer's Exhibit 8. In the proceedings before the district director, however, Employer also submitted an autopsy report by Dr. R. Naeye. The regulations at 20 C.F.R. §725.414(a)(3)(i) provide that the responsible operator shall be entitled to obtain and submit, in support of its affirmative case, no more than one report of an autopsy. While the regulations do provide that a responsible operator can submit a rebuttal autopsy report, that provision is not applicable since Claimant has not submitted any autopsy report into the record. Therefore, Employer's second autopsy report, prepared by Dr. E. Oesterling, will be excluded from consideration pursuant to Section 725.414(a)(3)(i).

On October 4, 2005, Dr. R. Naeye, a board certified pathologist, reviewed the autopsy report and the lung slides from that autopsy procedure. Dr. Naeye reported the slides showed severe emphysema and severe areas of fibrosis. Dr. Naeye stated the major pigment was hemosiderin which reflects the recurring episodes of intra-parenchymal pulmonary hemorrhage experienced by the miner prior to his death. Dr. Naeye reported only tiny bits of black pigment were present which were too small to confirm coal mine employment. He reported rare very tiny birefringent crystals of toxic free silica which he stated were too few in number to have caused fibrosis in the lungs. Dr. Naeye stated part of the fibrosis is artifact reflecting the widespread rupture of alveolar walls with subsequent fusion of individual segments, all of which he stated is a manifestation of severe emphysema. Dr. Naeye concluded the miner's lungs had bits of black pigment and scattered birefringent crystals present in severely damaged lung tissue without the formation of anthracotic macules, micronodules or other characteristic findings of coal worker's pneumoconiosis. Dr. Naeye stated the miner had massive lung damage which led to his death which was mainly manifestation of very severe centrilobular emphysema caused by years of cigarette smoking (DX 15).

F. Medical Opinion Reports

Employer submitted two medical opinion reports. On February 21, 2007, Dr. J. Castle, a pulmonary specialist, reviewed the medical evidence, including the autopsy report. Dr. Castle stated there is pathological evidence of mild, simple coal worker's pneumoconiosis. He stated further, however, this mild, simple coal worker's pneumoconiosis did not contribute to the miner's death since the pathologists all agreed the coal worker's pneumoconiosis present was too mild to have contributed to the miner's death. Dr. Castle stated the miner had significant coronary artery disease with previous myocardial infarction and he noted the miner's significant congestion related to his underlying cardiac disease contributed to his death. Dr. Castle stated

the miner's death was due to cardiac arrest following surgery for ruptured bulla. He stated that bullous emphysema is not related to coal mine dust exposure but rather is either congenital or related to smoking. Dr. Castle concluded the miner's death was not caused by the mild degree of coal worker's pneumoconiosis present and the miner would have died the same way with or without coal mine employment and coal mine dust exposure and with or without the presence of coal worker's pneumoconiosis (EX 6). At a deposition taken on March 12, 2007, Dr. Castle stated that Dr. Hansen, the autopsy prosector, concluded the miner's death was due to cardiopulmonary arrest in the presence of severe chronic obstructive pulmonary disease and atherosclerotic cardio-vascular disease. Dr. Castle reiterated his opinion that there was no pathological evidence of significant pneumoconiosis which impacted the functional areas of the lungs. He also noted there was no radiographic evidence of coal worker's pneumoconiosis even on CT lung scans, supporting his finding that the pneumoconiosis present pathologically was minimal. Dr. Castle noted that the miner's severe bullous emphysema resulted in bronchopleural fistula which required surgery which the miner did not survive. Thus, Dr. Castle stated the miner's death was unrelated to the pneumoconiosis present but was due to tobacco smoke induced lung disease with recurrent complications (EX 12).

Dr. J. Tomashefski, a board certified pathologist, reviewed the medical evidence, the autopsy report and the lung slides on March 12, 2007. Dr. Tomashefski stated the miner had severe atherosclerotic and hypertensive cardiovascular disease which resulted in cardiomegaly, myocardial fibrosis, and evidence of long standing left ventricular cardiac failure as evidenced by pulmonary fibro-congestive changes, lymph angiectasia and hemosiderosis. The bullous emphysema, present in the miner's right upper lung lobe, was accompanied by acute and chronic pleural changes consistent with ruptured emphysematous bullae. Dr. Tomashefski also reported the presence of talc pleurodesis which he stated at his deposition was an indication of an attempted medical treatment to help seal the miner's pleural spaces. In addition, Dr. Tomashefski stated there was evidence of shock. Dr. Tomashefski agreed that pathologically there is evidence the miner had mild coal worker's pneumoconiosis. He stated the cause of the miner's death was respiratory failure and shock which were related to the ruptured emphysematous bulla in the right upper lobe. Dr. Tomashefski stated that bullous emphysema is associated with coal worker's pneumoconiosis only in cases where progressive massive fibrosis is present, and that condition was not present in this case. The lesions of coal worker's pneumoconiosis present were far too minimal to cause respiratory symptoms, impairment or the miner's death. Dr. Tomashefski stated he could not tell if the interstitial fibrosis present was related to the miner's pulmonary dust deposits, however, he stated it is unlikely the interstitial fibrosis contributed to the miner's death which was due to pneumothorax, shock and cardiac failure (EX 10). At a deposition taken on April 10, 2007, Dr. Tomashefski stated the miner's death was due to systemic shock which was the result of the surgery. Dr. Tomashefski reiterated his opinion the miner's pneumoconiosis was too mild to have any deleterious effect on the miner's condition (EX 14).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

Part 718 applies to survivors' claims which are filed on or after April 1, 1980. 20 C.F.R.

§ 718.1. There are four possible methods of analyzing evidence in a survivor's claim under Part 718: (1) where the survivor's claim is filed prior to January 1, 1982 and the miner is entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; (2) the survivor's claim is filed prior to January 1, 1982 and there is no living miner's claim or the miner is not found entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; (3) the survivor's claim is filed after January 1, 1982 and the miner was found entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; and (4) the survivor's claim is filed on or after January 1, 1982 where there is no living miner's claim filed prior to January 1, 1982 or the miner is found not entitled to benefits as a result of a living miner's claim filed prior to January 1, 1982. The fourth, subsection 718.205(c) applies to this claim.[4]

For a claim filed on or after January 1, 1982, the Part 718 regulations provide that a survivor is entitled to benefits only where the miner *died due to pneumoconiosis.* 20 C.F.R. § 718.205(a). As a result, the survivor of a miner who was totally disabled due to pneumoconiosis at the time of death, but died due to an unrelated cause, is not entitled to benefits. 20 C.F.R. § 718.205(c). Under § 718.205(c)(4), if the principal cause of death is a traumatic injury or a medical condition unrelated to pneumoconiosis, the survivor is not entitled to benefits unless the evidence establishes that pneumoconiosis was a substantially contributing cause of the death.

The regulations now provide that in a Part 718 survivor's claim, the Judge must make a threshold determination as to the existence of pneumoconiosis arising out of coal mine employment, under 20 C.F.R. § 718.202(a), prior to considering whether the miner's death was due to the disease under § 718.205. 20 C.F.R. § 718.205(a).

B. Existence of Pneumoconiosis

30 U.S.C. § 902(b) and 20 C.F.R. §718.201 define pneumoconiosis as a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. §718.201.

The claimant has the burden of proving the existence of pneumoconiosis by any one of four methods. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest x-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and

[4] The survivor is not entitled to the use of lay evidence, or the presumptions at §§ 718.303 and 718.305 to aid in establishing entitlement to survivors' benefits. A survivor is automatically entitled to benefits only where the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982. However, a survivor is not automatically entitled to such benefits under a claim filed on or after January 1, 1982 where no miner's claim was filed prior to January 1, 1982. *Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988).

supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a).

Although the chest x-ray evidence was contradictory, with one highly qualified physician concluding that pneumoconiosis was present radiographically and one other equally qualified physician concluding pneumoconiosis was not present radiographically, I find the positive x-ray report is well supported by the persuasive medical opinion reports submitted by the Employer, all of which agreed that simple coal worker's pneumoconiosis was present. Therefore, I find Claimant has established the presence of pneumoconiosis under subsection 718.202(a)(1) by positive chest x-ray report of Dr. Patel.

A finding of the existence of pneumoconiosis may be made with autopsy evidence. 20 C.F.R. § 718.202(a)(2). As noted above, although Dr. Hansen's report was not included in the record, but Dr. Castle reported the autopsy report concluded simple coal worker's pneumoconiosis was present. On review of the autopsy, Dr. Naeye stated that the coal worker's pneumoconiosis was not present. This finding, however, was contradicted by the review reports of Drs. Castle and Tomashefski. I note that both Dr. Tomashefski and Dr. Naeye are highly qualified as board certified pathologists. In this case, however, where Dr. Tomashefski's report is supported by the findings of the autopsy prosector as well as the review report of Dr. Castle, a pulmonary specialist, I find Dr. Naeye's conclusions are outweighed by the other probative evidence of record. Therefore, I find the presence of pneumoconiosis is established by the autopsy report of Dr. Hansen as referred to by Dr. Castle and as supported by the medical opinion review reports of Drs. Castle and Tomashefski.

The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable. As noted above, however, both medical opinion reports as well as the treatment notes of Dr. Porterfield agree that simple coal worker's pneumoconiosis is present. Therefore, I find Claimant has established pneumoconiosis under the provisions of subsection 718.202(a)(4).

On consideration of all of the medical evidence, I find the positive chest x-ray by Dr. Patel, the positive autopsy report, and the medical opinion reports of Drs. Castle and Tomashefski outweigh the contrary medical evidence of record, specifically the negative chest x-ray reports by Drs. Wheeler and Hippensteel, the CT lung scan reports and the autopsy review report of Dr. Naeye. Based on persuasive evidence noted, I find Claimant has established the miner had coal worker's pneumoconiosis by chest x-ray, autopsy report and the medical opinion review reports of record as provided in Section 718.202(a).

C. Cause of pneumoconiosis

Once the miner is found to have pneumoconiosis, the claimant must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). Since the miner had at least twenty-five years of more of coal mine employment, the claimant receives the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. There is no evidence to rebut this finding. I find, therefore, Claimant has established the

deceased miner's pneumoconiosis arose out of coal mine employment.

D. Death due to Pneumoconiosis

Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that death will be due to pneumoconiosis if any of the following criteria are met:

> (1) competent medical evidence established that the miner's death was caused by pneumoconiosis; or
>
> (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or
>
> (3) the presumption of § 718.304 [complicated pneumoconiosis] is applicable.

Other than the unreasoned statement on the Death Certificate, there is no evidence that the miner's death was caused by pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. As set forth above, none of the physicians' reports concluded the simple coal worker's pneumoconiosis present either caused or contributed to the miner's death. Therefore, death due to pneumoconiosis can not be established under 718.205(c)(1) or (c)(2). Although Dr. Patel reported a large opacity on his chest x-ray report, that finding is outweighed by the pathological reports which all noted the changes were due to bullous developments which ruptured and caused numerous pneumothoraxes which resulted in the final attempt at surgical repair for these on-going problems. In addition, I note that Dr. Patel's statement regarding the presence of complicated pneumoconiosis was equivocal since he also noted on the x-ray report form that the large lesion could be a neoplasm. Dr. Patel's equivocal statement regarding this lesion is outweighed by the more complete pathological report of Dr. Naeye and the review reports of Drs. Castle and Tomashefski all of which concluded the lesion was an emphysematous bulla. That finding is also consistent with the records which indicate the miner was treated surgically for repeat pneumothoraxes due to ruptured bullae. Therefore, I find death due to pneumoconiosis is not established under the provisions of subsection 718.205(c)(3) since I find the probative and persuasive medical opinion reports establish that no complicated pneumoconiosis is present. Accordingly, since Claimant has not established her husband's death was due to pneumoconiosis under any of the methods set forth at Section 781.205(c), she is not entitled to survivor's benefits under the Act and her claim will be denied.

E. Attorney fees

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has established that the miner had pneumoconiosis, as defined by the Act and Regulations at the time of his death and that such pneumoconiosis arose out of his coal mine employment. However, the claimant has failed to establish that pneumoconiosis caused the miner's death or was a substantially contributing cause or factor leading to the miner's death. The claimant is therefore not entitled to benefits.

ORDER

It is ordered that the claim of J.V.B., widow of B.G.B., for benefits under the Black Lung Benefits Act is hereby DENIED.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with this Decision and Order you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which this Decision and Order is filed with the district director's office. *See* 20 C.F.R. §§725.458 and 725.459. The address of the Board is: ***Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, D.C. 20013-7601.*** Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor for Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210. *See* 20 C.F.R. §725.481.

If an appeal is not timely filed with the Board, this Decision and Order will become the final order of the Secretary of Labor pursuant to 20 C.F.R. §725.479(a).

E-FOIA Notice: Under e-FOIA, final agency decisions are required to be made available via telecommunications, which under current technology is accomplished by posting on an agency web site. *See* 5 U.S.C. § 552(a)(2)(E). *See also* Privacy Act of 1974; Publication of Routine Uses, 67 Fed. Reg. 16815 (2002) (DOL/OALJ-2). It is the policy of the Department of Labor to avoid use of the Claimant's name in case-related documents that are posted to a Department of

Labor web site. Thus, the final ALJ decision will be referenced by the Claimant's initials in the caption and only refer to the Claimant by the term "Claimant" in the body of the decision. If an appeal is taken to the Benefits Review Board, it will follow the same policy. This policy does not mean that the Claimant's name or the fact that the Claimant has a case pending before an ALJ is a secret.